No. 14397

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MOTORES DE MEXICALI, S. A., a corporation,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, *Appellee,* and E. A. LYNCH, Trustee of the Estate of Arbel, Inc., doing business as Bi-Rite Auto Sales, Bankrupt.

REPLY BRIEF OF APPELLANT.

ERNEST R. UTLEY,
417 South Hill Street,
Los Angeles 13, California,
Attorney for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

No. 14397

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MOTORES DE MEXICALI, S. A., a corporation,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, *Appellee,* and E. A. LYNCH, Trustee of the Estate of Arbel, Inc., doing business as Bi-Rite Auto Sales, Bankrupt.

REPLY BRIEF OF APPELLANT.

Preliminary Statement.

At the outset, we wish to draw the attention of this Honorable Court to what appears to us to be a rather inconsistent position taken by appellee.

In one breath the appellee contends that the order of the Referee granting its motion to strike the evidence of conversations between Motores and the bankrupt was proper, and in the next breath tries to strengthen appellee's position by reference to said evidence, or to findings which could only have been based upon the stricken evidence.

We will also point out other instances where appellee apparently accepts as facts parts of sentences of the stricken conversations without adopting the whole of such sentences.

Let's Keep the Record Straight.

Before we begin answering the points of argument made by the appellee, beginning at page 5 of its brief, and so that there may be no confusion over what testimony was objected to and stricken by the order of the Court, we will quote in full, First, beginning with the examination of Resnick [see R. 128, where first objections made; R. 130-132]:

"Q. Now, do you recall along about April 2nd when you came down to Mexicali to purchase a number of cars from Mr. Luken of the Mexicali Motors? A. Well, I don't recall the exact date. I know I went down to Mexicali.

Q. At the time you were there do you recall his having asked you if all the drafts for the month of March had been taken care of? A. Yes.

Q. And you recall telling him that they had been?

Mr. Fabian: I object to that on the ground it is immaterial to any of the issues before this Court as to the [56] title to the vehicles.

The Referee: What is the purpose of it?

Mr. Utley: It shows the representations that were made at the time of obtaining possession of the cars and title to them.

The Referee: You mean representations made to your client?

Mr. Utley: Yes.

The Referee: By the bankrupt?

Mr. Utley: Yes.

Mr. Fabian: But they are not binding on the bank. They are immaterial as far as the bank is concerned.

The Referee: Wouldn't that be so unless the bank knew about it?

Mr. Utley: May it please the Court, I will cover that point later on about the bank.

Mr. McDonnell: I think the Court should also bear in mind this is a three-cornered lawsuit between the Trustee and the bank and Mr. Utley's client.

Mr. Utley: Of course, the bank doesn't stand in the position of an innocent purchaser.

The Referee: That is questionable in California. Go ahead. I think the objection is good unless you can show—unless you can tie it up with the bank some way.

Mr. Utley: May it please the Court, I will call your attention in a few minutes as to how and in what manner THE [57] IS not in the position of an innocent purchaser.

The Referee: I know, but I mean any conversations like that unless the bank was connected with it wouldn't bind the bank, would it?

Mr. Fabian: That is my point.

Mr. Utley: This particular conversation won't bind the bank. In other words, we don't contend that the bank was a party to the transaction in question, to the transaction of getting the cars away from my client without paying for them—at that particular moment, anyway.

The Referee: I think you had better drop that line unless you can connect it with the bank in some way.

Mr. Utley: Well, I believe that is all then with this witness."

Second: From the examination of Luken [R. 137-139]:

"Q. Now, after they started with Bi Rite did you have a conversation with Mr. Resnick with respect to selling them cars? A. Yes, sir.

Mr. Fabian: I object to the conversation as not binding on the bank and hearsay.

The Referee: Wouldn't that be true?

Mr. Utley: May it please the Court, here is the situation. We have a right to show fraud here be-

cause otherwise if we sell automobiles under false representations we don't part with them voluntarily, and if the bank has knowledge of some situation that would estop them, that is a question as far as the bank is concerned.

Now, furthermore, there is another question here. If there is any equity in these cars over and above the amount of the bank's interest in them, and these titles to these cars were obtained from Mr. Luken under false pretenses, he would be entitled to that equity without regard to the bank's position.

The Referee: I know, but wouldn't the bank have to [65] be involved some way?

Mr. Fabian: Yes.

Mr. Utley: It is our contention, please the Court, that these drafts—if you will examine them, those drafts are all automobile purchase drafts, and they show on their face that they were for the purchase of a certain automobile, and they show on their face they were to be paid on presentation to the bank. Now, it is our contention that those drafts *laying there in the bank unpaid,* whether Mr. Fort himself knew about it or not, the bank was charged with knowledge that those drafts on these particular cars described in the drafts had not been paid and they were advancing money on cars that they knew had not been paid for.

The Referee: Assuming all that to be true, how would any conversation of this witness with someone else with which the bank was not concerned bind the bank?

Mr. Utley: Well, in the first place we must show that there was a fraudulent representation made to Mr. Luken in order to—

The Referee: Well, this is the way we will handle it. I will permit the question to be answered but

you may move to strike it unless they connect it up with the bank.

Mr. Fabian: All right.

Mr. McDonnell: I think that as to the Trustee's interest, as Mr. Utley is pointing out, I think probably the testimony is relevant and admissible, and that is why I [66] haven't objected.

The Referee: That is right."

Third: After the examination of Rodriguez had been concluded [R. 152] the following motion:

"Mr. Fabian: I think so. I move to strike, your Honor, the testimony of Mr. Rodriguez and Mr. Luken and—

The Referee: Let's handle that this way, take that under submission and and cover that on briefs, too. How will that be? I think that is a good motion.

Mr. Utley: I don't think it is. It is not good against the Trustee in any event because he stands in the position of the bankrupt. I think it is tied in with the bank on the idea you might say a bum check was presented to them for the sales price of that car and it was lying in the bank at the time and they certainly were put on notice.

The Referee: Well, that is the question, whether there was sufficient notice. You cover that in your briefs."

At the conclusion of the Referee's memorandum [R. 52] we find this language:

"The motion to strike out *the testimony of the representatives of the bankrupt and the Mexican corporation,* to which the Bank was not a party, must be granted." (Emphasis ours.) [See also, R. 50-51, par. 5.]

Notwithstanding the above ruling, it is interesting to note that the Referee in his memorandum [R. 44] says:

> "The evidence indicates that the Mexican corporation and the bankrupt contemplated a sale for cash. It is true that no checks were given, but the drafts given were intended to be of a similar nature. The bankrupt represented and the Mexican corporation understood that the drafts would be paid upon their presentation to the Bank."

How, may we ask, could the Referee arrive at the above conclusion and also make the findings hereinafter referred to without the benefit of the stricken evidence?

Paragraph 6 [R. 70] of the Referee's conclusions of law is:

> "The motion of the Bank to strike the testimony relating to the conversations between the representative of Motores de Mexicali, S. A. and the representative of the bankrupt was proper and must be granted, so far as the Bank is concerned."

and the Referee's order [R. 71] paragraph 5:

> "That the motion of the Bank of America National Trust and Savings Association to strike the testimony pertaining to the conversations between the representative of the bankrupt and the representative of Motores de Mexicali, S. A. is granted."

Now, one of the points emphasized by the Bank is the fact that Motores parted with the muniments of title to the cars. And where do we find this evidence except from the conversations between the bankrupt and Motores? The drafts, the documentary evidence, which the bank saw, say in effect that the muniments of title are attached. Appellee, in its brief at page 2, says:

> "The Appellant knew and understood at the time of delivery of the cars and the title documents that

the Bankrupt planned to register the vehicles in California and 'floor' them with a bank, and Appellant's manager delivered the title documents for the express purpose of putting the bankrupt in a position to place a lien on the vehicles and to obtain loans on the security thereof [R. 140, 144; Findings 10, 11, R. 64-65]."

and pages 140-144 of the record are cited in support of the above statement. We wish to quote from pages 139-144 of the record to demonstrate beyond doubt that the testimony given on these pages of the record related to a conversation between the bankrupt and Motores, and is entirely different from that represented by appellee:

"Q. And where did this *conversation* take place? A. In my office in Mexicali.

Q. And do you recall about when? A. I can't recall.

Q. Was it late last year or early this year? A. Well, it was more late last year.

Q. And what was said—what did Mr. Resnick tell you? A. *He told me* that he wasn't in business any more with Mr. Abel Melendez, who was the man that was paying for the cars with checks in Mexicali, but now he was in a patrnership with Mr. Cowan and they had all kinds of money and Mr. Cowan had put up a guarantee with the bank, that they were going to buy the cars with those drafts and the [67] drafts would be paid immediately on getting to the bank.

Q. What, if anything, *did he say* to you with respect to your delivering him immediate title to the cars? A. *He told us* they needed the titles in order to bring the cars across the border, bring them into California, and then take those papers into the Highway Patrol or the Registration Department here and get the pink slip, and with the pink slip they can floor

the cars with the bank and pay the drafts immediately upon presentation to the bank.

Q. And did you believe the representations he made to you with respect to their financial ability to pay upon presentation? A. Well, I believed him. We had done business with him before.

Q. And did you—after his telling you that, did you give him the title to the cars as well as— A. Yes, sir.

Q. If you had known that the drafts would not be paid immediately upon presentation, would you have parted with title to the cars? A. No, sir, because that is one thing I explained to him very clearly. We wouldn't give the titles unless we got the money." [R. 139-140-141.] (Emphasis ours.)

Cross-examination.

"Q. Now, in this *discussion* you testified about [71] Mr. Luken, you testified that *Mr. Resnick advised you* that—and you understood that the purpose of delivering the title documents in Mexico was that the cars would be floored; isn't that correct? A. Yes.

Q. And you understood what flooring means and understood at that time what flooring means; is that correct? A. Yes, sir.

Q. And that was contemplated at the time you delivered him the documents? A. Correct.

Q. Now, did you put the blank pieces of paper in those envelopes, Mr. Luken? A. No, sir, that is the way I was getting all the drafts (indicating). I didn't know there was a piece of white paper inside, or whatever there was inside.

Q. In other words, that is just the way they came to you? A. Yes, sir.

Q. Did you know there was blank pieces of paper inside of some of them? A. I knew after I opened

one when I got this back. I thought maybe it was a list of the cars that Mr. Rodriguez had specifying title or something that Mr. Resnick had, but I didn't know it was a white paper.

Q. Did you put these X's on the reverse of the drafts? [72] A. No, sir.

Q. At the place where it says 'Documents enclosed'? A. No.

Q. Do you know who did? A. Well, I think Mr. Rodriguez." [R. 144-145.] (Emphasis ours.)

We submit that appellee is in no position to take advantage of evidence which it has caused to be stricken, either in support of its argument or in support of findings which its counsel prepared pursuant to the Referee's direction. [See last paragraph Referee's Memo., R. 52.]

We could go on and on and cite numerous instances of where the appellee attempts to strengthen its position by virtue of facts only disclosed by the stricken evidence, but we believe the above will suffice to demonstrate our point here.

May we also suggest that if the Bank is not bound by the conversations between the bankrupt and Motores neither is it bound by their acts and conduct and whatever rule applies to the admissibility of one applies to the other.

Comment Upon Factual Statements Made by Appellee.

We take exception to the statement made at page 3 of appellee's brief to the effect that the lending officer of the bank had no knowledge of the unpaid drafts until after the advances were made, for as we shall hereinafter point out, we have Mr. Fort's (the lending officer) admission to the contrary. [R.—cross-examination—119-120.]

Not only have we shown that counsel for appellee has resorted to some of the evidence which appellee caused to be stricken in making his "Statement of the Case" on the first three pages of the brief, but a reading of the above quoted and undisputed testimony of Mr. Luken [R. 140] shows that the expressed purpose of flooring the cars with the Bank was to meet the payments of the drafts immediately upon presentation to the bank. [R. 140.]

It is also noticeable that counsel for appellee fails to comment upon the testimony of Mr. Fort, assistant cashier of the branch bank who actually made the loan to the bankrupt, that he knew on May 19, 1953 [R. 120] "the day the *last drafts to my knowledge were returned*" (emphasis ours) that a number of drafts then in the bank had not been paid. Yet on this very day he loaned the bankrupt $4,925.00 on the two Chevrolets described in two of the drafts of April 2, 1953, which were then in his bank and were returned unpaid on May 19, 1953. We quote from the record [R. 114-115]:

> "Q. Mr. Fort, I show you Trust Receipt No. 7884 [37] dated May 19, 1953, and ask you when you first received that document? A. That would have been on or about that date, May 19th.
>
> Q. 1953? A. Yes.
>
> Q. Did you give a credit when you took that trust receipt in? A. We did, in the amount of $4,925.
>
> Q. Does that show on the ledger sheet that is in front of you? A. $4,925 was credited to the account on *May 21, 1953.*
>
> Q. Did you receive any other document when you received that trust receipt? A. Yes. We received four California Ownership Certificates.
>
> Q. Are these documents two of the California Ownership Certificates that you received at that time? A. They are.

Q. And by 'these documents,' I refer to California Vehicle Certificates numbered T-1308392 and T-1308394. Those are the ones you received with this trust receipt? A. That is correct.

Mr. Fabian: I offer this—

Mr. Utley: Let me ask you, counsel, which of your [38] cars are covered in that one?

Mr. Fabian: Those are the two Chevrolets, Mr. Utley.

Mr. Utley: Those will be Exhibit 6?

The Referee: That is right, Bank of America's Exhibit 6." (Emphasis ours.)

and upon cross-examination [R. 119-120] Mr. Fort testified:

"Q. (By Mr. Utley): Mr. Fort, you testified a moment ago of your own personal knowledge that you didn't know there were any unpaid drafts, I believe you said, didn't you? A. Yes.

Q. You knew, did you not, that the bankrupt or Bi Rite Auto Sales had been purchasing cars from Motores de Mexicali in Mexico? A. As of what date or what time?

Q. Well, first, you knew of that, didn't you?

The Referee: You ought to give him a date.

The Witness: I did sometime in May. I don't recall the exact date.

Q. (By Mr. Utley): Well, while the drafts were still in the bank? A. The day that the last drafts to my knowledge were returned. That is the first knowledge I had.

Q. That appears to have been on May 19, 1953, that the last drafts were returned. Then you knew of that transaction at that time? A. Yes.

Q. And you knew that there were a number of drafts then in the bank that had not been paid? A. I did on that date, yes.

Q. Now, isn't it a fact that subsequent to that [44] date you extended a credit to BiRite on your ledger sheet here of—a credit on some of the cars purchased from Motores de Mexicali? A. On what date?

Q. You gave a date a while ago, I think it was the 21st.

The Referee: Wasn't it the 19th?

Mr. Utley: I think the date of the trust receipt shows on the Chevrolet the 19th. That was the date the drafts were returned, and the credit I think shows on the 21st of May.

The Witness: Well, of course, that day, on the 19th if we took them on the 19th, it is very possible that they would not have been credited until the 21st. However, I don't recall that 21st date."

That certainly shows actual knowledge of the bank officer who made the loan to the bankrupt of the existence in his bank of the unpaid drafts—drafts which he knew were being returned by his bank unpaid—covering, among others, two Chevrolet automobiles on which he on that very day loaned the bankrupt $4,925, and this credit was not given the bankrupt until two days later. This presents a clear case of actual knowledge of unpaid drafts by the lending officer of the bank before the money loaned got beyond the bank's control. And this transaction covers one-half of the money involved in this contract.

As heretofore pointed out in our opening brief, these two Chevrolets were obtained by the bankrupt from Motores on April 2, 1953, on the strength of Resnick's statement on that day made to Luken to the effect that all previous drafts had been paid. [R. 130-131; Re-direct examination, R. 146-147.]

ARGUMENT.

Answer to Point I of Appellee's Brief.

We are in agreement with the principle of law announced in Section 3543, Civil Code of California, and with the law in *Peoples Finance, etc. Co. v. Bowman,* 58 Cal. App. 2d 729, and other cases of similar import.

But, it is clear that the facts here are entirely different. Here appellee had possession and knowledge of the unpaid drafts. It could not look at the drafts without knowing that they were automobile purchase drafts covering the same automobiles upon which it was loaning money. The drafts also plainly stated that the muniments of title, indicated on the reverse side of the draft, would accompany the draft and when so presented, properly executed, Motores was to be paid the amount of money designated in the draft. This clearly disclosed a cash transaction, and appellee knew that it was the intent of the bankrupt to pay the draft promptly upon presentation provided proper documents conveying good title were available. When the bankrupt came to the bank to floor the automobiles in question with California pink certificates already in its name, this disclosed a variance from the procedure contemplated by the wording of the drafts, over the bankrupt's own signature, yet, as far as the evidence shows, the bank did not as much as question the procedure.

The appellee was charged with knowledge that similar drafts theretofore presented through appellee for payment had been paid promptly. [R. 128-142.] These drafts were numerous as the purchase of automobiles by the bankrupt from Motores ran as high as forty or fifty cars a month—all paid by automobile purchase drafts through appellee bank. It was a course of regular busi-

ness transactions handled through appellee bank. This, therefore, was not a single or remote transaction, and according to the undisputed evidence of the bankrupt and Motores, who gave the only testimony upon the subject, the prompt payment of these drafts through appellee bank was a common and regular practice over a period of several months. The fact that the bankrupt failed to pay the drafts promptly upon presentation in March and April, 1953, presented an unusual and out of the ordinary procedure from the previous transactions, where prompt payment had always been made. All of this, we respectfully urge, presented a danger signal and warning to appellee bank that there was something wrong. Banks are most always very alert and do not overlook such conduct on the part of people with whom they are doing business. Would such danger signals lead a reasonable man or a prudent banker to stop and inquire, especially in the light of the language upon the face of the draft? Would the prudent banker loan money upon automobiles which he knew had not been paid for?

In the previous transactions where the drafts were paid promptly upon presentation and the bankrupt borrowed money upon the automobiles described in the paid drafts, there was no reason for alarm since the purchase price had been paid and title had passed under the law. But where the purchase price has not been paid and that fact is known to the bank by the language upon the face of the draft itself, which is in the possession and under the control of the bank, and where the draft clearly states that payment of the draft and delivery of proper title to the automobile were concurrent conditions to be performed, such circumstances, we respectfully submit, put a reasonable person upon inquiry and upon notice.

As pointed out in our opening brief, these muniments of title held by the bankrupt, contrary to the language and intent expressed in the draft, could very well have been stolen, and were in fact stolen property under the provisions of Section 484, Penal Code of California, since the obtaining of property under false pretenses is defined as theft. The appellee is chargeable with knowledge that such is the law.

Is the appellee bank, under the facts here, an innocent third party; a holder in good faith and without notice? We think not, and therein is the distinction between the facts in this case and the facts in the cases cited by appellee.

The bank in the case of *Fowles v. Nat'l Bank of California,* 167 Cal. 653, had no danger signals such as were glaring before the eyes of appellee here at the very moment it loaned the money The same is true of appellant's position in *Powers v. Pacific Diesel Engine Co.,* 206 Cal. 334.

In the case at bar the drafts in the possession of the appellee plainly disclosed, over the signature of the bankrupt, that titles to the automobiles were intended to be delivered at the same time the drafts were paid, and not before. The appellee bank had no knowledge of anything to the contrary. If it did, its officer failed to reveal it while testifying.

Just how the quoted language in the *Bowman* case on page 5 of appellee's brief supports the bank's position, in the light of the facts here presented, we do not know. We have pointed out facts which disclose that the bank did not act with the caution a reasonable prudent person would act under the circumstances.

If the bankrupt had borrowed the money from some bank or finance company, who were not handling the collection of the automobile purchase drafts upon the strength of its indicia of ownership, and who was without the information and knowledge possessed by the appellee bank, and who otherwise acted in good faith and without notice of any defects in the title, the principle of law announced in the cases cited by appellee would be more in point.

In passing it is well to observe that the evidence in the cases cited by appellee, of a similar character to the evidence stricken upon appellee's motion herein, somehow was permitted to stand and was considered as competent evidence in those cases. The same is true with respect to similar evidence in the cases cited on page 18 of our opening brief.

We again find appellee making use of and citing evidence on page 6 of its brief which it caused to be stricken. There was no evidence concerning the right of the bankrupt to floor the cars except that coming from the conversation between the bankrupt and Motores and even so, counsel overlooks the full purport of this conversation which is to the effect that the flooring arrangement was to be used, whenever it was used, for the purpose of paying the purchase drafts promptly upon presentation to the bank. So far as the evidence shows, the appellee bank had no knowledge of this conversation. The appellant had a right to assume that the bank, by the very wording of the drafts, would know and understand that appellant was an unpaid seller for cash.

It is noticeable that the Oregon case cited on page 7 of appellee's brief holds that the owner

> "will be estopped to assert his title as against one who for value *and in good faith and without notice*

purchases the chattel in reliance upon the apparent ownership of the one so intrusted with possession and indicia of title." (Emphasis ours.)

It, as we have heretofore pointed out, is our contention that the appellee bank did not act in good faith and without notice.

Counsel for appellee would have the Court believe that the only reason the titles to the automobiles were delivered to the bankrupt was to enable him to borrow money on them at his will. This is not the testimony. [R. 140.] The bankrupt told Luken: 1st. He needed the titles in order to bring the cars across the (International) border; 2nd. Bring them in to California; 3rd. Then take those papers into the Highway Patrol or the Registration Department and get the pink slip; 4th. And with the pink slip they can floor the cars with the bank and pay the drafts immediately upon presentation to the bank.

The evidence is not clear, but it is doubtful if it was contemplated by the bankrupt and Motores that the drafts given, for example, on April 2, 1953, were to be paid by the flooring of the automobiles described in said drafts. It is obvious that the purchase drafts would, in the ordinary course of business, arrive at appellee bank in Los Angeles much sooner than the Mexican titles could be processed through the Motor Vehicle Department and the pink slips obtained.

If, therefore, the drafts were paid promptly upon presentation to the bank, the same as a check, as promised, the drafts would be paid long before the pink slips could be obtained from the Motor Vehicle Department.

This is further borne out by the fact that the pink slips on the two Chevrolets heretofore mentioned were not presented to the bank for the flooring of these two cars

until May 19, 1953. The drafts for these two cars were issued on April 2, 1953, and the documents of title were delivered to the bankrupt on the same day.

The loan on the Buick purchased on April 2, 1953, was not applied for until May 9, 1953. The loans on the two cars purchased on March 6, 1953, were not made until a month later. This, no doubt, was due to the fact that it took that long to secure the pink slips from the Motor Vehicle Department, whereas the drafts were presented for payment long before these dates, and if paid promptly as agreed, the money would have been available for appellant before the bankrupt would have been in a position to floor the cars with the bank.

This, of course, would not prevent the bankrupt from flooring cars previously paid for to secure money to pay subsequent drafts.

The expedition of securing California pink slips was only one of the several reasons for delivering the documents of title to the bankrupt. The bankrupt was confronted with the problem of bringing these cars through the customs at the International Border and into California with Mexican license plates and it appeared that some evidence of title was needed for this purpose.

We confess that we might have made this evidence clearer by additional questioning had we observed same at the time, however, we believe that the inference we have drawn from this evidence is reasonable.

We did not intend to convey the impression, as counsel for appellee states on page 8 of its brief, that appellee was under a duty to appellant to pay the drafts out of the proceeds of the loans. The thought we did intend to convey was that appellee was negligent under Section 3543 of the Civil Code of California in loaning

money on these automobiles when it knew by the plain language of the drafts in question that the automobiles were not paid for. In other words, if the language on the face of the drafts indicated anything, it was that the sales were intended as cash sales for according to the terms of the drafts, muniments of titles were to be delivered to the purchaser only upon payment of the drafts.

Appellee tries to make much of the words "for collection" upon the face of the drafts notwithstanding evidence amply supporting the Court's finding that as between the parties the sales were intended as sales for cash.

Appellee also overlooks the fact that the drafts state clearly that the drafts are to be paid to Motores when the documents of title referred to on the reverse side of the draft are with the draft, properly executed. This shows that the delivery of title and the payment of the drafts were concurrent conditions, and this shows an intended cash sale transaction.

Counsel for appellee argues (Br. p. 9) that knowledge of the personnel in the Collection Department of the bank is not imputed to the personnel of the Lending Department in the same bank.

We believe that we have covered this point sufficiently in our opening brief. The noticeable part of appellee's argument, however, is that appellee is strangely silent on the admission of Mr. Fort, hereinabove quoted, that he did know of the unpaid drafts and that they were being returned on May 19, 1954, the day that he made the loan of $4,975 upon the two Chevrolets. This evidence refutes counsel's statements at pages 3 and 10 of appellee's brief to the effect that there was no evidence that the lending officer's attention was called to the unpaid drafts. Counsel's citation of findings numbers 16 and 17, which he pre-

pared, does not strengthen his contention. Finding No. 16 refers to a period of time "Prior to May 19, 1953." The latter portion of finding No. 17 is in direct conflict with Mr. Fort's own admission above quoted, for it is shown that Mr. Fort knew on May 19th that the drafts were being returned unpaid and the credit for the money loaned was not entered upon the bank's records until May 21st. [R. 120, 114-115.] Aside from actual notice the bank, including the lending officer, was chargeable with notice of the unpaid drafts and their contents.

It seems to us to be a most unusual, indifferent and careless act for a bank to loan a person money upon an automobile which the bank knows is not paid for, and on the same day return the unpaid automobile purchase drafts to the seller. And another point which strikes us as rather unusual and which smacks of carelessness on the part of the bank is the length of time these April 2nd drafts were held without, in so far as the evidence shows, communicating the failure to collect to the person or bank sending the draft. More prompt action upon the part of the appellee bank in either communicating the facts to the sender of the drafts or an earlier return of same would have enabled Motores to take prompt action which would have prevented the bankrupt from encumbering the automobiles in question before California titles were secured.

Counsel argues that there can be no actionable negligence in the absence of a duty on the part of the bank to the appellant. There most certainly can be negligence on the part of the bank, which will prevent its recovery under Section 3543, Civil Code of California.

Again we emphasize that it is not a question of the duty of the bank to pay the drafts in question, but rather

its negligence in loaning money upon an automobile, which has not been paid for, under the circumstances here.

In answer to appellant's argument on page 11 of its brief, we must remember that, in so far as the evidence shows, the appellee bank knew nothing about the conversation between the bankrupt and appellant which resulted in the muniments of titles being personally delivered to the bankrupt upon his execution and delivery of the drafts to appellant, instead of these documents accompanying the drafts as indicated upon the face of each draft. Here again appellee would like to make use of testimony it caused to be stricken. What would be the natural reaction of any banker who received an automobile purchase draft stating in plain language that "upon presentation of this draft to the bank designated below for collection together with the documents properly executed indicated on the reverse side hereof" pay to (naming payee) $..... (inserting amount), and instead of finding document such as ownership certificate, registration card and bill of sale, he found blank pieces of paper in the envelope? Would not the question immediately arise in one's mind as to where the muniments of title were? Whether through neglect or oversight they were not enclosed or whether they had been stolen or lost, and then within a given period. say one month or one and one-half months the maker of the draft appeared at the bank—not with the documents which were supposed to accompany the drafts but instead a California pink slip showing the automobile to be in his name, and then and there made application for a loan upon the automobile described in the draft. Would not the question immediately arise as to where and how the maker of the draft secured the California pink slip, and more especially without the payment of the purchase draft? And would not the question arise in the mind of

the reasonably prudent person as to the propriety of the maker of the draft borrowing money upon property which he has not as yet paid for? Should not such facts put a reasonably prudent person upon inquiry? If the bank ever made such inquiry it is not disclosed from the evidence, and the bank was under no compulsion to make the loans in question.

Appellee argues in one paragraph that the effect of the transaction between the Bankrupt and Motores was a credit transaction and in the next paragraph cites Finding 17, finding as a fact that "as between Motores and the bankrupt it was intended that the sales be sales for cash."

Before passing from Finding 17, one of the most glaring errors in this finding is [R. 68] to the effect that the bankrupt intended to fulfill his promise that the drafts would be paid promptly upon presentation to the bank the same as a check, at the time the promise was made, and yet Motores was prevented by objection of appellee from securing from Resnick [R. 131] an admission that he lied to Luken on April 2 about the payment of the March drafts. Counsel for the appellee bank say this makes no difference for Luken testified to this fact without contradiction, but counsel overlooks the fact that all of this evidence was also stricken upon his motion. Furthermore, it would seem that an admission upon the part of Resnick that he falsely represented to Luken that all March drafts had been taken care of on the very day that he was issuing further worthless drafts for cars would be very material in determining Resnick's fraudulent intent.

Just what acts of the appellant in the transaction (App. Br. p. 13) were designated to induce the bank to extend credit on the faith of the title documents, we do not know.

In so far as the record shows, no acts of appellant, good, bad or indifferent were communicated to the bank other than those the drafts disclosed.

We cannot agree that Finding 15 is supported by the evidence. We contend that the purchase drafts bear all the earmarks of a cash sale, and that the bank had and was charged with knowledge of the contents of the drafts.

Appellee, in answer to appellant's argument at page 14 of its brief says:

> "In answer to this contention we again point out that Appellant voluntarily relinquished the title documents to the Bankrupt for the specific purpose of enabling the Bankrupt to borrow money on the security thereof. It is a fair conclusion that if inquiry had been made, this fact would have been made known to the Bank."

Again we emphasize that appellant only consented that the bankrupt borrow money on the cars for the expressed purpose of paying the drafts promptly, upon presentation to the bank. Therefore, had the bank inquired of Motores at the times the loans were requested, which was a month to a month and a half after the drafts had been issued, and the bank had informed Motores, for example, on May 19th, that the drafts of March 6th were still unpaid, it is not difficult to imagine what Motores would have said or done, and more especially in view of Resnick's statement to Motores on April 2nd that the March drafts had been paid. This would have given Motores an opportunity to, and it is reasonable to assume that it would have taken immediate steps to protect its property.

In answer to the argument that appellant could have protected itself by having the muniments of titles attached

to the drafts or the enclosure thereof in the draft envelope, appellee loses sight of the fact that these documents were obtained upon false representations to the effect that the drafts would be paid immediately upon presentation to the bank, the same as a check; on April 2nd that the drafts for March had been taken care of, and that the automobiles had to cross the International Border and these documents were essential to clear the passage of the automobiles. Mr. Luken testified that this was one of the reasons for the delivery of the muniments of title to the bankrupt.

Appellee, in the last paragraph of its brief on page 15, would lead the Court to believe that Motores had knowledge of the return of the March 6th drafts on March 18th in spite of Mr. Luken's uncontradicted testimony to the contrary [R. 142-143], and Finding 12 does not fasten knowledge of the return of these drafts on Motores and if it did, it would be contrary to all the evidence in the case. There is no evidence, as insinuated by appellee, that "appellant saw fit to re-submit the drafts (or March 6) for collection a second time." All the evidence is to the contrary, and shows that Motores believed the March drafts were paid at the time of the delivery of the cars on April 2nd. In fact Resnick told him on April 2nd that all March drafts had been taken care of.

Point C.

Under the above heading on page 16 of appellee's brief, it contends that the conversations between the bankrupt and Motores were irrelevant as to the bank, and were properly stricken, and as authority therefor cites the same cases as cited by the Referee in his Memorandum Opinion. [R. 51.]

We have covered this question in Point Four, page 31, of our opening brief, also Appendix V, page 22, except

that we now observe for the first time that we, through oversight, failed to have printed on page 23 of Appendix V of our opening brief, the comments of the Court in the case of *Wilcox v. Salomone,* 118 Cal. App. 2d 704, covering the exceptions to the hearsay rule. These comments are to be found on page 712 of said decision and are:

"In Whitlow v. Durst, 20 Cal. 2d 523, our Supreme Court said at page 524 [127 P. 2d 530]:

" 'When intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule, and it is immaterial that such declarations are self-serving. Thus, in cases involving the delivery of deeds, declarations of the alleged grantor made before and after the making of the deed are admissible upon the issue of delivery, and it is immaterial that such declarations are in the interest of the party producing them. (Williams v. Kidd, 170 Cal. 631 [151 P. 1, Ann. Cas. 1916E 703]; Donohue v. Sweeney, 171 Cal. 388 [153 P. 708]; De Cou v. Howell, 190 Cal. 741 [214 P. 444]; see McBaine, Admissibility in California of Declarations of Physical or Mental Conditions, 19 Cal. L. Rev. 231, 251.) Likewise, in gift cases declarations made by the grantor before, contemporaneously, and subsequent to the alleged gifts are admissible though the statements be self-serving. (Sprague v. Walton, 145 Cal. 228 [78 P. 645].) In alienation of affections cases declarations of an alienated spouse subsequent to the defendant's alleged tortious acts are admissible as evidence of the spouse's state of mind. (Adkins v. Brett, 184 Cal. 252 [193 P. 251]; Cripe v. Cripe, 170 Cal. 91 [148 P. 520].)'

And in Hansen v. Bear Film Co., Inc., 28 Cal. 2d 154 [168 P. 2d 946], the court quoted the foregoing

language from Whitelow v. Durst, with approval, and said further, at pages 173-174:

"'Appellants contend that the trial court erred in admitting in evidence oral and written declarations of ownership of the stock and of the company made by Oscar, not within the presence or to the proved knowledge of Josephine, but subsequent to the transfers to her and in derogation of them. (Chard v. O'Connell (1936), 7 Cal. 2d 663, 667 [62 P. 2d 369]; Francoeur v. Betty (1915), 170 Cal. 740, 747 [151 P. 123]; Bollinger v. Bollinger (1908), 154 Pac. 695, 705 [99 P. 196]; Miller v. Miller (1942), 55 Cal. App. 2d 199, 207-208 [130 P. 2d 428]; Taylor v. Bunnell (1926), 77 Cal. App. 525, 534 [247 P. 240].) However, under well recognized exceptions to the hearsay rule, such declarations made before, at the time of, or subsequent to the transfers, were properly admissible on the issue of delivery to Josephine (and it was found that the instruments were delivered to her), on the issue of a claimed gift, and also to show the intent or state of mind of Oscar.'"

As pointed out in our opening brief, these conversations between the bankrupt and Motores were material and proper in determining the question of whether the sale was a cash or credit transaction; whether the property was obtained from Motores upon false and fraudulent representations of the bankrupt.

Similar evidence was properly offered in all the cases cited by counsel for appellee on page 5 of its brief as well as the cases cited in our opening brief.

We have heretofore called the Court's attention to the difficulty counsel for appellee has in trying to present his case in an intelligent manner without the aid of the stricken evidence. As a matter of fact, it just cannot be done.

And as we have pointed out, many of the findings prepared by Counsel for appellee and signed by the Referee are based upon stricken evidence, and without which the findings have no support whatsoever. It is difficult to imagine what the facts in this case would sound like without the aid of the stricken evidence. Its elimination just doesn't make sense, and is plain error.

Appellant's Point II.

It would appear that we have fully covered the point here raised. In answer to appellee's contention on page 19 of its brief, may we again point out that a draft was used instead of a check in *Johnson, et al. v. Robinson, et al.,* 203 F. 2d 135. Also, there is no evidence that appellee ever saw the Mexican registrations and bills of sale, any finding of the court to the contrary notwithstanding. The appellee saw the California pink slips after the cars had been registered in California. (App. Br. bottom pp. 20-21.)

Appellee cites the case of *Sullivan Co. v. Wells,* 89 Fed. Supp. 317, and cases similar import.

In the case above cited, it would appear that the United States District Court of the State of Nebraska was following the law of that State as announced in a decision of the Nebraska Supreme Court in accordance with the rule of law in *Erie R. Co. v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

The State law of California upon the subject, as we have shown in our opening brief, is not in harmony with the Nebraska decisions and therefore such decisions are of little weight.

Appellant's Point III.

Appellant has never contended, and does not now contend that the bank was charged with notice of any fraud by reason of oral misrepresentations to Motores by the bankrupt at Mexicali, Mexico, and which was not communicated to the bank before it parted with value. We do contend, however, that the bank is chargeable with the facts and circumstances of the automobile purchase drafts, paid and unpaid, coming into its possession and with such other information, written or oral, which came to its attention prior to the time that it loaned the money upon the automobiles in question.

Our argument under Point Two of our opening brief at pages 19-20 is first directed at the rule of law announced in *Kamberg v. Springfield Nat'l Bank,* 103 A. L. R. at 306, and the other cases under this heading. We then point out why the bank is chargeable with notice, all of which is based upon the knowledge and information the bank obtained in handling these automobile purchase drafts and in its dealing with the bankrupt.

The appellee's position would have been entirely different had it not been in possession of the facts heretofore referred to which put it upon notice that the automobiles were unpaid for, and also facts which would lead a reasonable person to believe that the sales were intended as cash sales.

At the bottom of page 23 and at page 24 of appellee's brief, it is said:

> "Counsel contends in Point 4 of his brief [R. 31-32] that the Court should have permitted the witness Resnick to answer the question as to whether or not he told the Appellant that the March drafts had been

taken care of. It is submitted that the Referee's ruling in excluding this testimony as to the Bank was correct under the authorities cited in Section I, C of this brief. In any event the same matter was covered by the testimony of Mr. Luken. Since the testimony of Mr. Luken on this point is uncontroverted we cannot see how the Appellant was prejudiced by the rejection of the testimony of Mr. Resnick. Mr. Luken testified [R. 147] that 'I asked him how he was with the drafts. He said that everything had been taken care of.' The testimony of Mr. Resnick, the exclusion of which the Appellant now contends was error, was therefore cumulative, whether or not it was material or relevant."

Counsel seems to now contend that the refusal to permit Resnick to answer the question mentioned under Point Four of our opening brief at page 31, if error, was harmless error since Luken testified to the same thing. Counsel seems to forget that his motion to strike this testimony of Luken was granted. But regardless of this, Motores was entitled to Resnick's admission that he had fraudulently represented to Luken that all March drafts had been paid. Such evidence would have refuted the finding by the Court of good faith and intent upon the part of the bankrupt. [See Finding 17, R. 68.] It also goes to the question of whether or not Motores knew of the unpaid March drafts at the time he sold the April 2nd cars. [See Finding 12, R. 65.]

Findings Based Upon Stricken Evidence.

Try hard as counsel for appellee may, he cannot get away from the fact that many of the findings of the Referee (which counsel prepared) are based upon the stricken evidence. Eliminate the stricken evidence and there is absolutely no evidence to support the findings men-

tioned at page 24 of appellee's brief, and commented upon, beginning page 34 of our opening brief.

Answering appellee's argument under "Conclusion," if one of the significant points in the case "was the delivery of the possession of the cars and the title documents by the appellant to the bankrupt *with the intent that the bankrupt should 'Floor' with the bank*" (emphasis added), then counsel for the appellee made a serious mistake in moving to strike the testimony which wrecked this valuable point.

Conclusion.

We have freely commented upon and quoted the evidence which was stricken by the Court for without it the factual situation here would not make sense. It would be difficult, indeed, to make an intelligent statement of the case without resort to the stricken evidence. This, it seems to us, demonstrates one well founded reason why the motion to strike should have been denied.

For the reasons mentioned in our briefs, it is respectfully submitted that the judgment should be reversed.

Respectfully submitted,

Ernest R. Utley,

Attorney for Appellant.